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CHARLES ELMORE

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 498.

TRANSIT COMMISSION AND WILLIAM G. FULLEN, LEON G. GODLEY AND CHARLES C. LOCKWOOD, CONSTITUTING THE TRANSIT COMMISSION, *Appellants*,

*against*

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

STATE OF NEW YORK, *Appellant*,

*against*

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

## BRIEF FOR APPELLEE, THE LONG ISLAND RAILROAD COMPANY.

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The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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Appellants,

AGAINST

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Appellees.

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STATE OF NEW YORK,

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AGAINST

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY and INTERSTATE COMMERCE COMMISSION,

Appellees.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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## BRIEF FOR APPELLEE, THE LONG ISLAND RAILROAD COMPANY.

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Opinion of the District Court, not yet reported, will be found as an appendix to this brief. The Reports of the Interstate Commerce Commission are printed at 162 I. C. C. 363 and R. p. 29; 166 I. C. C. 671 and R. p. 59; 175 I. C. C. 163 and R. p. 72.

## Statement.

This is a suit, brought under the Act of Congress approved October 22, 1913, 28 U. S. C. A., secs. 41 (28) and 43-48, to enjoin and set aside a certificate and order of the Interstate Commerce Commission, issued April 10, 1930, which, as modified, certified that the present and future public convenience and necessity permits the abandonment by The Long Island Railroad Company, on October 15, 1931, of 4.1 miles of its Whitestone branch, in the Borough of Queens, City and State of New York.

The suit was commenced on July 31, 1931, by the filing of a petition in the District Court of the United States for the Southern District of New York by the Transit Commission against the United States and the Long Island Railroad Company. The respondents duly filed answers and the Long Island Railroad Company filed a motion to dismiss.

On September 1, 1931, the State of New York filed an identical petition against the same parties and seeking the same relief. The respondents therein duly filed answers.

The Interstate Commerce Commission intervened in both suits, and filed answers.

On September 17, 1931, upon the application of the Transit Commission and the State, an order to show cause was made convening a special court of three judges—the Honorable Martin T. Manton, Senior Circuit Judge, the Honorable Francis G. Caffey and the Honorable Alfred C. Coxe, United States District Judges—and requiring the respondents to show cause before that Court on September

30, 1931, why the order of the Interstate Commerce Commission should not be temporarily enjoined.

At the hearing held on the order to show cause on September 30, 1931, the two suits were consolidated. All parties rested on the record before the Interstate Commerce Commission and submitted the case for final determination.

On October 15, 1931, the Court handed down a unanimous opinion holding that the petitions should be dismissed on the merits. A final decree to that effect was made and entered October 17, 1931 (R. p. 747).

From the decree so entered this appeal was taken pursuant to Section 47-a, Title 28, of the United States Code.

The branch was not abandoned October 15, 1931. After the decision dismissing the petition was handed down on October 15, 1931, a motion was made for a stay pending appeal which the statutory court denied but the railroad company agreed to continue operation for a week to afford appellants an opportunity to move this Court or a Justice thereof for a stay. Appellants made the motion and a stay was granted.

## Proceedings before the Interstate Commerce Commission

The application to the Commission for certificate of abandonment was filed by the railroad company January 10th, 1929. (Petition, R. p. 128).

The map, Exhibit 4 (R. p. 648), shows comprehensively the branch and the territory served. It is on a scale of 1"=400' (R. p. 291). The prints, Exhibits 6 and 7 show

the routes of the two City-owned rapid transit systems. The existing bus and trolley routes in the territory are shown on Exhibit 4.

The Commission's authority was invoked and exercised under Section 1, paragraphs (18 to 20) and (22), of the Interstate Commerce Act, which provides:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be

constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of

this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The Commission sent the application to an Examiner who held hearings and proposed a report (R. p. 14) on or about November 14, 1929 in favor of abandonment.

Exceptions were filed to the proposed report by the Transit Commission of the State of New York, The City of New York and The Association of Long Island Commuters, *et al.*

The Commission, by Division 4, heard argument on the exceptions and found in favor of abandonment filing a report and making an order and certificate, dated April 10, 1930 (*Long Island Railroad Company Abandonment*, 162 I. C. C. 363, R. p. 29). The effective date of the certificate was thirty days from the date thereof. The railroad company was directed to install substitute service for transportation on the branch by bus and truck for less-than carload freight at College Point and Whitestone, if it might lawfully do so.

As to freight service the Company could lawfully furnish it without securing further rights or franchises from the

local authorities. In fact the Company had installed trucking for less-than-carload lots to College Point and Whitestone under tariffs filed prior to the application for abandonment (R. p. 258).

As to bus service, franchises or temporary licenses were necessary from the local authorities before the Company could lawfully establish such service (see *post*, pp. 58, 59).

The Transit Commission of the State of New York, dissatisfied with the findings and conclusions of Division 4, asked for a reargument which was granted. The effective date of the abandonment was extended pending the reargument.

After reargument, before the full Interstate Commerce Commission that Commission on November 3, 1930, made a report in which it adhered to the conclusion in favor of abandonment and in addition directed the railroad company to submit its proposal for substitute service to the local authorities and report to the commission the result within 60 days (*Long Island Railroad Company Abandonment*, 166 I. C. C. 671, R. p. 59).

The railroad company thereupon submitted its proposal for substitute service in detail to the local authorities, including a formal application for bus franchises which it made to the Board of Estimate and Apportionment of the City of New York, the franchise granting body, and within 60 days reported to the Interstate Commerce Commission that it had done so. The company suggested that it would make further report after formal consideration of the franchise application by the Board of Estimate and Apportionment. (See Company's report to the Commission, R.

p. 124 dated January 3, 1931, to which was attached forming part thereof a copy of the Company's franchise application to the Board of Estimate.)

The Board of Estimate and Apportionment not having taken any action on the franchise application and the efforts of the railroad company to secure the cooperation of the local authorities to the end that substitute service might be installed not having met with success the company May 12, 1931, so reported to the Commission and petitioned that the Company be relieved from the obligation to install or secure substitute service and that a definite date be fixed for the abandonment (Petition, R. p. 98).

The Commission by supplemental Report and order, dated June 17, 1931, fixed the effective date of the certificate of abandonment (*Long Island Railroad Company Abandonment,* 175 I. C. C. 163, R. p. 72). It said in its Report at page 166 (R. p. 76):

> "* * * It is manifest from its attitude, however, that the city is not disposed to accord that measure of cooperation which we had anticipated. Nearly seven months have elapsed since the applicant first approached the city with a request for a conference and more than five months have passed since the applicant, receiving from the city no reply to its offer to confer, filed an application for a bus franchise.
>
> Under the circumstances we are of the opinion that an effective date should be designated for the certificate issued on April 10, 1930. An appropriate order will be entered which will provide that the certificate shall take effect from and after 120 days from the date of the order. The condition contained in the certificate will be permitted to stand."

The suits by the Transit Commission and by the State of New York to set aside and annul the Commission's certificate and order and to enjoin the abandonment were then brought as hereinabove set forth.

The Appellants contend that the Interstate Commerce Commission had no jurisdiction to make the certificate and order or that if it had jurisdiction the exercise thereof was not warranted because the findings and conclusions were not supported by evidence.

The Appellees contend that the jurisdiction of the Commission to certify the abandonment is well settled and that there was ample evidence to support the findings and conclusions of the Commission.

## Summary of Argument.

### I.

**The jurisdiction of the Interstate Commerce Commission to certify the abandonment is well settled.**

The argument that the Commission went beyond its power and could not certify abandonment because the Company's business as a whole is prosperous is unsound.

The argument is unsound that the Commission went beyond its power and could not certify abandonment because such certification would be an encroachment upon the police power of the State to compel the elimination of grade crossings.

The suggestion in the dissenting opinion 162 I. C. C. 378 that the Commission might not have jurisdiction because of the nature of the Company's business is entirely unsupported by evidence and contrary to the undisputed facts.

There is nothing to sustain the contention of the Transit Commission that the Interstate Commerce Commission gave undue weight to the admission by Counsel to the Transit Commission that "since the application for abandonment was filed the Board of Transportation has prepared tentative plans for extension" of a rapid transit line into the Whitestone area.

### II.

**Since the jurisdiction of the Interstate Commerce Commission to certify the abandonment is well settled the Court will not substitute its judgment for the judgment of the Commission unless the judgment is based on findings not supported by evidence.**

### III.

**The Findings and Conclusions of the Interstate Commerce Commission are amply supported by the evidence.**

There is ample evidence to support the findings and conclusions of the Commission. There is ample evidence:

1. That the continuous falling off of business for a number of years has resulted in an annual operating deficit for the branch which

amounted to upwards of $125,000 in 1928, and on the figures for the first five months of 1929 was reasonably certain to reach $150,000 in 1929.

2. That if operation is to continue grade crossings must be eliminated at a cost of from $4,248,762 to $4,661,407, at least half of which must be borne by the company which will impose upon the company an added annual fixed charge of from $120,000 to $150,000.

3. That inevitably the business on the branch will continue to fall off and with increasing rapidity. Inevitably the territory served by the branch will be served by the city's rapid transit 5-cent fare systems and busses. By the time the grade crossing eliminations are completed, or at best soon thereafter, the company's business on the branch will be gone and the large capital expenditure for grade separations will have been wasted.

4. That there is trolley service and bus service in the territory. That the bus service could be readily supplemented and that the railroad company could and would, if allowed by the local authorities, furnish the supplemental service.

5. That the freight service could be readily provided for and that the company could and would provide for it.

6. That the company had in good faith and diligently made every effort to secure the cooperation of the local authorities to the end that adequate bus service might be installed either by the company or by such other agencies as the local authorities might elect and that the local authorities had failed to grant the necessary bus franchises to the company or to others and failed to cooperate with the company in any way to bring about the installation of bus service.

## Conclusion.

"The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the state. * * * The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." Colorado v. United States, 271 U. S. at pages 165-166. After a searching and (evidenced by its Reports) painstaking inquiry into the facts the Commission has exercised its judgment. The jurisdiction of the Interstate Commerce Commission is clear. There was ample evidence to support the Commission's findings and conclusions. The decree of the lower Court should be affirmed.

## ARGUMENT.

### I.

**The jurisdiction of the Interstate Commerce Commission to certify the abandonment is well settled.**

*Colorado* v. *U. S., et al.*, 271 U. S. 153;
*United States Feldspar Corporation* v. *U. S.*, 38 Fed. (2d), 91, 94;
*Abandonment of Lincoln Branch by Detroit & Mackinac Ry.*, 138 I. C. C. 576;
*Abandonment by Chicago, Rock Island & Pacific Railway Co.*, 138 I. C. C. 793, at p. 795;
*Abandonment of Branch Line by Mobile & Ohio R. R.*, 138 I. C. C. 305;
*Operation and Abandonment by Atchison, Topeka and Santa Fe Ry.*, 138 I. C. C. 573;
*Abandonment by New York, Susquehanna & Western R. R. Co.*, 138 *I. C. C.* 614;
*Abandonment of Lines by Central Indiana Railway Co.*, 150 I. C. C. 227;
*Abandonment of Line by Detroit and Mackinac Railway Co.*, 150 I. C. C. 735.

The freight business on the whole of the Long Island Railroad is from 75% to 80% interstate (R. p. 450). On the branch it is 75% interstate (R. p. 258). The passenger business is practically all intrastate but there is some interstate (R. p. 448 and Exhibit 27, R. p. 739).

All of the arguments of the appellants on the question

of jurisdiction and conflict with the rights of the State are completely answered by the opinion in *Colorado* v. *U. S., et al., supra,* a similar case where the arguments presented here by the appellants were urged on behalf of the State of Colorado. Mr. Justice Brandeis, writing for a unanimous court summarized the contentions of the State and pointed out their fallacy as follows (p. 161 *et seq.*):

> "*First.* The main contention of the State is that the Commission lacks power to authorize the Company to abandon, as respects intrastate traffic, a part of its line lying wholly within the State. The argument is this. While a railroad cannot, in the absence of express statutory provision or contract, be compelled by a State to continue operating its lines at a loss when there is no reasonable prospect of future profit, and may, therefore, without such consent, abandon all lines within the State, *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396; *Bullock* v. *Florida,* 254 U. S. 513, 520; *Railroad Commission* v. *Eastern Texas R. R. Co.,* 264 U. S. 79, 85; it has no right to abandon a part of the lines, merely because operation will be attended by pecuniary loss, and still continue to enjoy the privilege of operating other parts within the State; *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission,* 242 U. S. 603; *Fort Smith Light & Traction Co.* v. *Bourland,* 267 U. S. 330. The charter of the Colorado & Southern is a contract with the State. By accepting the charter, the Company assumed the obligation of providing intrastate service on every part of its line within the State, *Colorado & Southern Ry.* v. *Railroad Commission,* 54 Colo. 64, 92-3. The extent and character of this service is subject to regulation by the State. The inherent power of a State to regu-

late intrastate traffic by requiring the railroad to operate every part of its line, like its power to order a particular service, is, of course, subject to the limitation that the order must not be unreasonable. But the fact that operation of the branch will necessarily result in financial loss, would, in no event, be more than an important circumstance bearing upon the reasonableness of the State's order requiring the service. In the case at bar no question of the reasonableness of the State's action can arise, because the State has not issued any order; it has merely protested against the Commission's releasing this Colorado corporation from the primary duty voluntarily assumed of maintaining some service on the branch. This, the Commission cannot do as respects intrastate commerce. Transportation Act, 1920, did not purport to take from the State its powers to control intrastate commerce. Nor did it confer upon the Commission power to release a corporation chartered by the State from its primary obligation to furnish service. If par. 18 of § 1 should be construed as authorizing the Commission to do so without the consent of the State, the provision would be unconstitutional. Compare *Texas* v. *Eastern Texas R. R. Co.*, 258 U, S. 204, 217. Such is the argument."

Having so summarized the contentions of the State the opinion showed their unsoundness as follows:

"The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its

order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commis-*

*sion of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318; or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control.

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not, in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 293. It expressly excluded from federal control that part of the railroad which consists of 'spur, industrial, team, switching or side tracks located * * * wholly within one state.' See *Texas & Pacific Ry. Co.* v.

*Gulf, Colorado & Santa Fe Ry. Co., supra.* But as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment.

Recognition of the effect upon interstate commerce of the use of the same instrumentality in intrastate commerce is manifested also in other provisions of Transportation Act, 1920. It is a reason for the exclusive jurisdiction conferred upon the Commission by § 20a over the issuance of securities. Compare *Venner* v. *Michigan Central R. R. Co., ante*, p. 127. It is the ground upon which the validity of the recapture clause, as applied to surplus profits derived from intrastate operations, was sustained in *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 485. It is the justification for those provisions of the Interstate Commerce Act which require carriers engaged in both intrastate and interstate commerce to render accounts of all their business. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194. And upon it rests likewise the power exerted by this Court in setting aside the state regulations involved in *Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67, and *St. Louis & San Francisco Ry. Co.* v. *Public Service Commission*, 254 U. S. 535. See also *United States* v. *Ferger*, 250 U. S. 199; *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also as-

sumed, efficiently to render transportation services in intrastate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare *Railroad Commission* v. *Eastern Texas R. R. Co.*, 264 U. S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York* v. *United States*, 257 U. S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission. * * *"

And at the close of the opinion (pp. 169-170):

"The case at bar is unlike *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204. There, the railroad was permitted to be relieved only from continuing operations in interstate commerce. It was being operated independently, and not as a branch of any railroad engaged in interstate commerce. Losses incurred in its operation would not be reflected in the accounts of any interstate carrier; and no interstate carrier would have had to make good deficits so incurred. Its continued operation could not burden or prejudice interstate

Commerce, for the Commission in issuing its certificate had adjudged that public necessity and convenience did not demand the continuance of its interstate services."

**The argument that the Commission went beyond its power and could not certify abandonment because the Company's business as a whole is prosperous is unsound.**

The argument that the Commission could not exercise its jurisdiction because the Long Island Railroad Company is prosperous places upon the abandonment provisions of the interstate commerce act a limitation not contained in the act—a limitation in conflict with all of the reasons which prompted the extension of the Commission's jurisdiction to include abandonments.

There is no justification for limiting the application of the statute to branches of railroads whose general earnings make an unfavorable showing. The intent and tenor of the Act is that the discretion of the Commission shall be free to protect prosperous carriers from the loss of operating branches where all the circumstances show such operation would be wasteful and improvident. In taking over this field of regulation Congress plainly had in view the continuance of prosperous operation. There is no warrant for limiting the exercise of the Commission's power to cases where the carrier is in failing circumstances.

The statute is quite as much to keep carriers prosperous as to relieve carriers which may have become unprosperous. The idea that the Commission ought not to take hold until a carrier has reached the point of financial distress or threatened financial distress finds no support in the statute.

The Commission has repeatedly certified the abandonment of branches of railroad companies whose business was sound and prosperous. A few cases may be cited: *Southern Pacific Company Abandonment,* 162 I. C. C. 391; *Abandonment by Mobile & Ohio R. R.,* 138 I. C. C. 305 (where the point was made that the applicant's system was a prosperous one and the Commission rejected it); *Abandonment of Line by Southern Ry.,* 145 I. C. C. 355; also 105 I. C. C. 228, quoted from by Commissioner Woodlock in his concurring opinion in the present Whitestone Branch Case; *Abandonment of Operation of Line by Chicago, Rock Island and Pacific Ry. Co.,* 138 I. C. C. 793; *Abandonment of Line by Baltimore & Ohio R. R. Co.,* 145 I. C. C. 655.

In the *Mobile & Ohio R. R. Case, supra,* the Commission said, italics ours:

> "The protestants further contend that while we may have jurisdiction to permit abandonment of the line in so far as interstate and foreign commerce are concerned, it is necessary for the applicant to procure the consent of the Kentucky Railroad Commission in order to accomplish complete abandonment. *The point also is made that the applicant's system is prosperous.* These questions have been considered and disposed of by the Supreme Court of the United States in *Colorado* v. *United States,* 271 U. S. 153, which case is cited by the protestants in arguing that the continued operation of the Columbus branch would not lessen the ability of the applicant properly to serve interstate commerce."

The opinion in the *Colorado Case* fully supports this conclusion. The Court said at pages 166-167; italics ours:

> "The State contends further that the order is void, so far as it relates to intrastate traffic, because essential

findings were not made and, also, because essential findings made were not supported by evidence. *The Chicago Junction Case,* 264 U. S. 258. The findings alleged to be essential and lacking are that by continued operation of the branch interstate or foreign commerce will be discriminated against, *or that the Company will be prevented from earning a fair return on the value of its properties as a whole, or that the entire intrastate business in Colorado will not earn such a return upon the property used in conducting that business.* The other objections urged are that the evidence of past operating deficits on the branch, which include both interstate and intrastate traffic, does not support the finding that operation in intrastate traffic alone will result in like deficits; and that the decision of the Commission was improperly influenced by an offer to lease the line to the protestants at a nominal rental. All the evidence before the Commission was introduced below and is, in substance, incorporated in the record on appeal. Both classes of objections must, therefore, be considered. *New England Divisions Case,* 261 U. S. 184, 203.

* * * * *

While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. The sole

test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585, 587, 589; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 485; *United States* v. *Village of Hubbard*, 266 U. S. 474. The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. Compare *Proposed Abandonment by Boston & Maine R. R.*, 105 I. C. C. 13, 16. The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate."

It should be noted as bearing upon the prosperity of the Long Island Railroad Company's business as a whole that in 1928 the net railway operating income was $7,542,459, only 5.72% on the Company's investment in road and equipment $131,747,689. This was less than the 5¾% which must be deemed to be a fair return. *In the Matter of Rates, Fares and Charges of Carriers by Railroad subject to the Interstate Commerce Act*, 68 I. C. C. 676 at 734. (The investment in road and equipment is shown in the Balance Sheet, Exhibit 11, R. p. 706. The net railway operating income is shown in Exhibit 10, R. p. 688-A).

**The argument is unsound that the Commission went beyond its power and could not certify abandonment because such certification would be an encroachment upon the police power of the State to compel the elimination of grade crossings.**

That the State has a wide, almost unlimited, power to impose upon a railroad corporation heavy capital expenditures for the separation of grades at highway crossings cannot be disputed. The fact that such expenditures are inevitable and imminent is one of the things which the Commission must consider and weigh. The Company's obligation to eliminate grade crossings imposed by the exercise of the State's police power is no different from its other corporate obligations. It is one of the things it must do so long as it continues to operate the branch. It is one of the things it is relieved from doing when it is authorized to abandon the branch. The paramount power to relieve a railroad corporation from operating a branch includes the power to relieve it from all corporate obligations it otherwise would be required to perform in order to maintain the road and control operation. It was within the power of the Commission to consider the necessity for grade eliminations and the resulting burden upon the Company if the branch were continued in operation.

**The suggestion in the dissenting opinion 162 I. C. C. 378 that the Commission might not have jurisdiction because of the nature of the Company's business is entirely unsupported by evidence and contrary to the undisputed facts.**

Commissioner Aitchison in his dissenting opinion (162 I. C. C. at p. 378 and 166 I. C. C. at p. 679, R. p. 49 and p. 69) expresses a doubt about the jurisdiction of the

Commission because of the nature of the company's business. He says (162 I. C. C. at p. 378):

"The line which it is sought to abandon is an electric surburban railroad, a small fragment of the large Long Island Railroad system. It lies wholly within the city of New York.

The operations of the Long Island present two wholly dissimilar aspects. Through the tunnels under the East River, it operates from the monumental Pennsylvania Railroad station on Manhattan Island a high-speed electric urban, suburban, and interurban railroad service to points on Long Island. On an average 65 per cent of the operating revenues of applicant's entire line is derived from its passenger service. The overwhelmingly greater proportion of the passenger business is short ride, frequent trip, in character, and largely wholly within the city of New York. The electric lines also connect with the steam lines of the Long Island at the outer edge of the suburban electric district, and steam motive power is employed for the lines east on Long Island. But the predominating character of the urban and suburban electric passenger traffic can be somewhat judged from the fact that 90 per cent of the population of the whole of Long Island is found within the island boroughs of the city of New York, served by the Long Island. In addition, the Long Island has the usual characteristics of a steam railroad. It has the same system of freight terminals, including lighterage, and steam-train operation, as the other rail carriers serving New York Harbor.

The line in question, sought to be abandoned, is a part of the electric urban and suburban system first described. But for the fact that as a part of the Long Island's 'general steam railroad system of transporta-

tion' a wholly negligible amount of freight business is done upon the branch for a few industries, the line would easily fit within the description of 'street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation' and therefore, so far as abandonment is concerned by express terms of sec. 1 (22) of the act excluded from our jurisdiction. Whether the particular branch in question is in fact operated as a part of a general steam-railroad system of transportation may be questioned."

It was not claimed or suggested on the hearings that there were two systems. The evidence is clear that there is but one system. There is single ownership. There is no separation physically, financially or in operating practices into two systems, one an "electric urban and suburban system" within the city and another the steam lines outside of that city (Annual Report, Exhibit 11, R. p. 689). The statement that "the electric lines also connect with the steam lines of the Long Island at the outer edge of the suburban electric district and steam motive power is employed for the lines east on Long Island" is not supported by any evidence and is contrary to the fact. It is true that the lines for both freight and passenger service are electrified more extensively within the limits of the city than beyond the city limits but it is not true that "the electric lines also *connect* with the steam lines of the Long Island at the outer edge of the suburban electric district and steam motive power is employed for the lines east on Long Island." There is no distinctive "suburban electric district". There is no distinctive steam motive power district or territory. While the suburban service is largely electric there is still a substantial amount of steam service.

Electrification is being gradually extended and as the lines are electrified electric power is used for both freight and passengers long and short distances. The mere fact that electric power is being used more extensively for the urban and suburban service does not make the company's urban and suburban service a separate system (see *Southern Pacific Company Abandonment*, 162 I. C. C. 391). Long distance trains serve also the urban and suburban traffic. The same trains are operated in unbroken transit from distant points into the terminals, in many cases the whole distance by electricity and in many cases part by steam and part by electricity.

There is not a scintilla of evidence in the case which justifies the implication that there are two systems, one an electric urban and suburban service and the other a steam operated system.

**There is nothing to sustain the contention of the Transit Commission that the Interstate Commerce Commission gave undue weight to the admission by Counsel to the Transit Commission that "since the application for abandonment was filed the Board of Transportation has prepared tentative plans for extension" of a rapid transit line into the Whitestone area.**

In its report by Division 4, 162 I. C. C. at p. 375, R. p. 46, the Commission said:

> "From the standpoint of the future it is indicated that it is only a question of time before the area in question will be served either by an extension of the rapid-transit system or by busses. This fact is conceded by counsel for the Transit Commission in his brief in the following language:
>
> 'As long as the Whitestone branch continues to operate, it is improbable that the City will exten

its rapid-transit lines into that area, although we understand that, since this application for abandonment was filed, the Board of Transportation has prepared tentative plans for extension into that area. We think, however, that the City should not be forced to incur great expense in order to fill the void left when the applicant divests itself of its obligations.'

That the applicant can not compete with the rapid-transit system and bus lines is clearly demonstrated by the effect on the branch of the extension of the rapid-transit service to Flushing. Nor can it be doubted from the facts of record that the transportation facilities in the area served by the branch are now in a state of transition from the service furnished by the applicant to service by those instrumentalities. In the light of these facts the expenditure of approximately $2,000,000, or about $500,000 per mile, for the elimination of grade crossings, in addition to the operating losses sustained plus the interest charges on the cost of elimination, would constitute a waste of money which could not do otherwise than impose burdens upon commerce, both interstate and intrastate."

In the court below it was briefed and argued on behalf of the Transit Commission that (a) the Interstate Commerce Commission should not have considered this statement by counsel because counsel to the Transit Commission was not empowered to speak for the City of New York and that (b) the Interstate Commerce Commission must have considered the facts set forth in an application, which the Railroad Company made but which was denied, to reopen the case in order to permit the railroad company to put in

proof of an announcement by the Board of Transportation as to prospective rapid transit lines including a line into the Whitestone territory. There is no evidence that the Interstate Commerce Commission considered any facts outside of the record proof and we submit that the Transit Commission cannot complain because the Interstate Commerce Commission referred to the statement of counsel of the Transit Commission contained in a brief submitted when the exceptions to the report of the Examiner were argued.

There was ample proof of the location of operated rapid transit lines and their relation to the territory served by the Whitestone Branch (Interborough Rapid Transit Lines, Map Exhibit 6, R. p. 686B; B. M. T. Lines, Rapid Transit Division, Map Exhibit 7, R. p. 686C; Exhibit 4 Map, R. p. 648). There was ample proof of the fact of the extension of those lines as far as Flushing and of the effect of such extension upon the business on the Whitestone Branch (R. pp. 253, 398, and *post*, p. 31, where operating deficits are discussed). It is true that there was no evidence in the case of the adoption and legalization under the statutes of a route for an extension of the rapid transit line from Flushing directly to Whitestone but the fact that such an extension was under discussion was volunteered by counsel to the Transit Commission. How can the Transit Commission complain that it was prejudiced or that the Interstate Commerce Commission went beyond its power in considering statements made by counsel to the Transit Commission in arguing his case?

## II.

**Since the jurisdiction of the Interstate Commerce Commission to certify the abandonment is well settled the Court will not substitute its judgment for the judgment of the Commission unless the judgment is based on findings not supported by evidence.**

In determining whether an order of the Commission shall be suspended or set aside the court will examine the question of the power of the Commission but will not pass on "the mere expediency or wisdom of having made it". *Interstate Commerce Commission* v. *Ill. Cent. R. R.*, 215 U. S. 452, 470.

The findings of the Commission are not "merely *prima facie* but conclusively correct" unless it be shown that the Commission has gone beyond its jurisdiction in the exercise of its power. *United States* v. *Louisville & Nashville R. R.*, 235 U. S. 314, 320.

"It may be conceded that the evidence would have warranted a different finding * * * but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative and this can not be done". *Manufacturers Ry. Co.* v. *U. S.*, 246 U. S. 457, 482.

"If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony it can not be set aside by the

courts, as it is only the exercise of an authority which the law vests in the Commission". *Pennsylvania Co.* v. *U. S.*, 236 U. S. 351, 361.

"* * * the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority". *Seaboard Air Line Ry. Co.* v. *U. S.*, 254 U. S. 57, 62.

## III.

**The findings and conclusions of the Interstate Commerce Commission are amply supported by the evidence.**

There is ample evidence to support the findings and conclusions of the Commission. There is ample evidence:

1. That the continuous falling off of business for a number of years has resulted in an annual operating deficit for the branch which amounted to upwards of $125,000 in 1928, and on the figures for the first five months of 1929 was reasonably certain to reach $150,000 in 1929.

2. That if operation is to continue grade crossings must be eliminated at a cost of from $4,248,762 to $4,661,407, at least half of which must be borne by the company which will impose upon the company an added annual fixed charge of from $120,000 to $150,000.

3. That inevitably the business on the branch will continue to fall off and with increasing rapidity. Inevitably the territory served by the branch will be served by the city's rapid transit 5-cent fare systems and busses. By the time the grade crossing eliminations are completed, or at best soon thereafter, the company's business on the branch will be gone and the large capital expenditure for grade separations will have been wasted.

4. That there is trolley service and bus service in the territory. That the bus service could be readily supplemented and that the railroad company could and would, if allowed by the local authorities, furnish the supplemental service.

5. That the freight service could be readily provided for and that the company could and would provide for it.

6. That the company had in good faith and diligently made every effort to secure the cooperation of the local authorities to the end that adequate bus service might be installed either by the company or by such other agencies as the local authorities might elect and that the local authorities had failed to grant the necessary bus franchises to the company or to others and failed to cooperate with the company in any way to bring about the installation of bus service.

**Operating Deficits.**

The exhibits forming part of the Return to the Questionnaire show the revenues and expenses allocated and prorated for the branch sought to be abandoned. They cover 4 years, 1925 to 1928 inclusive.

The passenger and freight traffic and revenues, together with the net railway operating income are shown as follows:

FREIGHT (Exhibit H 1-4, R. p. 148 A *et seq.*).

| | | Tonnage | | Branch Revenue |
|---|---|---|---|---|
| 1925 | Carload | 108,580 | | |
| | L. C. L. | 3,934 | | |
| | Total | | 112,514 | $10,960 |
| 1926 | Carload | 103,180 | | |
| | L. C. L. | 3,882 | | |
| | Total | | 107,062 | $11,534 |
| 1927 | Carload | 101,075 | | |
| | L. C. L. | 4,161 | | |
| | Total | | 105,236 | $12,070 |
| 1928 | Carload | 102,802 | | |
| | L. C. L. | 5,406 | | |
| | Total | | 108,208 | $11,545 |

PASSENGER (Exhibit I, R. p. 148 E).

| | Passengers | Revenue |
|---|---|---|
| 1925 | 2,435,370 | $443,435 |
| 1926 | 2,461,380 | $449,095 |
| 1927 | 2,260,927 | $414,193 |
| 1928 | 1,583,133 | $277,292 |

NET RAILWAY OPERATING INCOME

(Exhibit F, part 1, R. p. 142 E).

| | | |
|---|---|---|
| 1925 | $16,102. | |
| 1926 | $13,464. | |
| 1927 | $18,468. | Deficit |
| 1928 | $125,759. | Deficit |

It will be noted that the freight traffic and revenues were substantially the same over the four-year period. The passenger traffic and revenues show a slight increase 1925 to 1926 followed by a decrease in 1927 and a very marked decrease in 1928, the year the rapid transit extension to Flushing was opened (R. pp. 253, 398). The total decrease from the high point in 1926 to 1928 amounted to 877,453

passengers and $171,803 in passenger revenue, or over one-third of the total.

The net railway operating income declined steadily from an income of $16,102 in 1925 to a deficit of $18,468 in 1927, and a marked increase in deficit to $125,759 in 1928.

Statements are in evidence showing the pasenger revenues in 1929 so far as available as compared with a similar period in 1928. Exhibits in case, Nos. 3, 3A, 3B, 3C (R. pp. 640-647) and No. 12 (R. pp. 729-730) put in at (R. p. 482).

These exhibits showing the passenger revenues for the first 5 months in 1929 are most significant.

The Return to the Questionnaire shows for the year 1928, as has been pointed out, passenger revenue of $227,292. The 5 months of January, February, March, April and May 1929 show:

January, 1929—$22,096 as compared with $35,861 in January 1928, a falling off of 38%. The rapid transit extension was opened in January 1928.

February 1929—$18,860 as compared with $24,700 in February 1928, a falling off of 24%.

March 1929—$18,609 as compared with $23,378 in March 1928, a falling off of 20%.

April 1929—$19,511 as compared with $23,430 in April 1928, a falling off of 16%.

May 1929—$17,102 as compared with $24,333 in May 1928, a falling off of 29.7%.

There was evidence that if the decrease continued during 1929 at the rate of say 20% the total passenger revenue for the year 1929 would be approximately $215,000, or a falling off of $62,000 as compared with 1928.

Summarized the figures for 1928 show an operating deficit of $125,759. There is evidence that in 1929, upon the showing of the first 5 months, the operating deficit would be at least $150,000, making all allowances for a possible reduction of expenses (Exhibits cited *supra* and R. pp. 252, 482).

**Method of Allocating and Prorating Revenues and Expenses on the Branch.**

In allocating and prorating the revenues and expenses the company proceeded as to freight traffic on the assumption that freight service will be continued on the portion of the branch which will not be abandoned and discontinued on the balance of the branch. The revenues and expenses of handling this freight traffic were prorated between the portion of the branch to be abandoned and the balance of the railroad on a mileage basis (see Questionnaire Exhibit G, R. p. 143, and Mr. Rawson at R. pp. 315, 316, 464-474).

As to passengers, the company assumed that the entire passenger service between Whitestone Landing on the East and Long Island City and Pennsylvania Station on the West will be discontinued if the branch is abandoned. The revenues allocated to the branch were therefore taken as the revenues from this entire passenger service. Similarly, the expense of handling this entire passenger service was assigned to the operating expenses of the branch (see Questionnaire Exhibit G and R. p. 315). The company included as part of the expenses of the branch the joint facility costs, including rental, based on the present terminal contract, incurred in the operation of the Whitestone

Branch trains into the Pennsylvania Station. The amount thus included and charged to the Whitestone Branch service is the percentage which the total number of cars in the Whitestone Branch service in and out of the Pennsylvania Station bears to the total of all Long Island cars in and out of the Pennsylvania Station.

There was evidence that while it is true that the discontinuance of the Whitestone Branch service will result in little if any decrease in the Pennsylvania Station costs, the discontinuance of this service will permit the operation of additional cars and trains over other parts of the Long Island system where traffic is now badly congested and additional trains are needed. Discontinuance of the Whitestone Branch service will thus permit a greater use of the Pennsylvania Station for more profitable business (see Questionnaire Exhibit G and testimony, R. pp. 376, 396, 302).

Maintenance of Way expenses with the exception of the joint facility expenses and the expense of maintaining power facilities, include only expenses directly assignable to that portion of the branch to be abandoned plus overhead expenses for superintendence, insurance, injuries to persons, stationery and printing, etc., which are prorated on an assigned-charge basis (see Questionnaire Exhibit G and testimony, R. pp. 296, 361 *et seq.*). Nothing was included to cover the maintenance of roadway and track facilities between Whitestone Junction and Harold Avenue used by the Whitestone Branch trains and by other Long Island trains (R. p. 310). The maintenance of power facilities were prorated on the basis of car miles run by electric trains (R. p. 305).

The maintenance of equipment expenses were prorated on the basis of car miles in the case of repairs to cars and electric equipment of cars, and on the basis of train miles in the case of repairs to locomotives (see Questionnaire, Exhibit G, R. p. 305). Cars and trains are run indiscriminately in the Whitestone Branch service and in other service of the railroad and it is impossible to allocate the expenses in any other manner (R. p. 305).

In the conducting-transportation group of expenses the expense of station employes, drawbridge operation, signal and interlocker operation and crossing protection were taken as expenses directly assigned to the branch. Expenses of train operation such as motormen, trainmen, etc., were prorated on a car mileage or train mileage basis, as the train crews operating the trains in the Whitestone Branch service have runs which include service on other parts of the railroad as well. Superintendence, dispatching trains and other similar overhead items were prorated to the branch on an assigned charge basis (Questionnaire Exhibit G and testimony, R. p. 306).

Taxes include real estate and special franchise taxes on the property which it is proposed to abandon and the gross earnings tax imposed by the State of New York on the branch revenues (R. pp. 391-395).

A statistician, Dr. Bauer, testifying on behalf of The Long Island Commuters Association (R. p. 498 *et seq.* and Exhibit 17, R. p. 738) questioned the inclusion in the costs allocated to the branch of certain expenses which he characterized as "non-variable costs". He explained this term as meaning that if operation of the branch ceased such expenses would not be reduced. His theory was that while

it would be proper to include such costs in a rate case it is improper to include them in an abandonment case. He objected specifically to the inclusion of the joint facility expenses and rental for the use of the Pennsylvania Station under the Long Island's trackage agreement, also to the inclusion of the expenses of superintendence and of dispatching trains. This theory is fallacious. The expenses would be saved if the branch were abandoned and should be allocated in an abandonment case exactly as they are in a rate case and in abandonment cases are invariably so allocated.

As regards other items of expense, Dr. Bauer made an arbitrary reduction of 25% in the direct costs of maintenance of way and structures and of 10% in the direct costs of maintenance of equipment and conducting transportation on the theory that as the volume of business decreases the expense of conducting the business will not decrease in the same proportion. The 25% and the 10% are purely arbitrary; the witness seems to have drawn them out of the empty air.

The Commission said, 162 I. C. C. 363 at 372, 373, R. p. 43:

> "* * * There can be no doubt that where amounts are prorated as in the present case (which method is followed by the applicant in accordance with our regulations), they can not be accepted as strictly accurate, but they do give a fair indication of the actual situation. The basis used by the protestant certainly is more arbitrary and less convincing than the prorating method."

The evidence fully supported this conclusion.

**Operating Deficits Will Increase.**

There was evidence that there is every reason to anticipate that the falling off of passenger revenue will continue and that it is inevitable that the falling off will increase rapidly.

The branch is entirely within the Borough of Queens in the City of New York. The Borough of Queens is building up more rapidly than any other borough of the city. Rapid transit service by the city-owned systems has already been extended to adjacent territory as far as Main Street, Flushing (see maps Exhibits 4, 6 and 7, R. pp. 648, 686B, 686C). This extension with an entirely inadequate service has taken an increasing number of passengers from the Whitestone Branch and continues to take more and more with its 5-cent fare furnishing transportation over all the rapid transit routes. It was built with a third track for express service to Manhattan in the morning rush hours and out in the evening rush hours but the third track instead of being used for express trains is used for car storage owing to disputes or difficulties with the lessees who operate the city systems (R. pp. 410, 411, 631, 632, 253, 255). The cars of one of the operating companies do not fit the extension structure (R. p. 411); the tracks have not been signalled (R. p. 412); there is litigation between the city and the other lessee (R. p. 632). The service is a temporary makeshift although the structure stands ready for an adequate service with express trains. With an express service to Flushing, even if no direct branch be built to the Whitestone territory, the Whitestone Branch people would go to the five-cent fare line in even larger numbers than have been going since the Flushing route was opened.

There was ample evidence to support the conclusion that the rapid transit lines had increasingly taken the business from the Whitestone Branch and that patrons of the Branch had turned to busses and automobiles to reach the rapid transit station at Main Street, Flushing (R. pp. 257, 275, 280, 281, 568). There was evidence that this was the fact notwithstanding inadequate bus facilities. There was evidence that adequate bus facilities were imminent. The distances are very short and but for unfortunate temporary difficulties over bus franchises in the City of New York there would have been an adequate bus service long ago. The only lines now operated are operated under revocable licenses. These permits are issued upon the theory of temporary emergency measures pending the grant of regular franchises by the Board of Estimate and Apportionment, the city's legislative body, which is attempting to organize a comprehensive system of busses (R. pp. 255-256, 425, 426). Obviously the temporary bus operation now giving the service to the Whitestone district has been against the development of good service. The time is imminent when adequate service by busses will be furnished under regular franchises which will invite responsible bus corporations by grants of permanent rights instead of revocable permits. With adequate bus service people from the Whitestone territory will at once go to the 5-cent fare routes to Manhattan.

Complaint was made at the hearings that the train schedules were unsatisfactory and purposely intended to discourage business on the branch and counsel argued that with more convenient trains the operating deficits would vanish. It was disclosed, however, that the train service had been a matter of investigation by the Transit Com-

mission (R. p. 336); that the present schedule has that Commission's sanction; that the amount of service for the various divisions and branches was governed by the terminal facilities in Manhattan, and that additional trains could not be given without taking trains away from some other division where traffic is a great deal heavier than on the Whitestone Branch (Testimony of the Transit Commission's Chief of Service Bureau, R. pp. 417-420). The charge that the company had been discriminating against the branch in arranging its train schedules was entirely unsubstantiated.

**An Inadvertence of Computation in the Dissenting Opinion with Respect to Operating Losses.**

With deference we call attention to an obvious inadvertence in the dissenting opinion (162 I. C. C. at 380-381, R. p. 49) where, in criticizing the inclusion of the general expenses and overheads for the use of the Pennsylvania Station in New York City. Commissioner Aitchison writes at page 382 (R. p. 54):

> "Omitting the amount apportioned for joint-facility rents, which the abandonment of the line will not diminish, and the branch yielded profits of $175,-117.07 and $33,457.90 for the years 1927 and 1928 instead of deficits".

This is an erroneous computation. It evidently was made from the figures in the return to the Questionnaire, Exhibit F thereof, part 1 (R. p. 142E). The mistake came from taking the net revenue from railway operations instead of the net railway operating income as the starting point. With this corrected the estimated profit, according

to Commissioner Aitchison's theory, for 1927 would have been only $68,699.85 and the estimated profit of $33,457.90 for the year 1928 would have been turned into a deficit of $54,968.97, or, stated in another way, Commissioner Aitchison deducted the joint facility item from a total for each year which had not included it. In calling attention to this inadvertence in the application of Commissioner Aitchison's theory we do not concede the soundness of the theory itself.

Whether or not the joint facility costs be included it is obvious that there was ample evidence to support the conclusion that the branch is being operated at a loss which is bound to increase and is so wasteful that operation should not continue.

**Grade Crossing Elimination Costs.**

The estimated cost of grade crossing eliminations is shown on company's Exhibit 2 (R. p. 639) and there is no substantial difference between the total of the company's estimates and the total of the Transit Commission's estimates (see Mr. Schwartz's testimony, R. p. 441).

The company's share of the elimination expense would be between $2,330,703 and $2,537,026, the difference being due to a possible requirement of the War Department with respect to a new bridge at the Flushing River and a question as to what the company's share of the cost would be if it has to be built (R. pp. 251, 435 *et seq.*)

The claim was made at the hearings that the elimination of the grade crossings would save annual charges for maintaining gates and signals and make a saving in acci-

dent damages. There was evidence however that increased taxes on the new crossing structures and increased maintenance costs for such structures would make an offset to the saving (R. p. 304).

The separation of grades would consequently impose additional annual fixed charges on the company of from $120,000 to $150,000.

**Bus and Trolley Service.**

There is a direct trolley line from College Point to the Flushing, Main Street rapid transit station which is a few steps away from the Long Island's Main Street station on the Port Washington Branch (see Exhibit 4, R. p. 648).

There is a bus line from Whitestone Landing through Whitestone to the Main Street rapid transit station (see Exhibit 4, R. p. 68).

Malba is not on the trolley line and only partly on the bus line (R. pp. 270, 271) but 75% of the Malba people use their own cars to stations on the Port Washington Branch (R. p. 568). It is a restricted residential community (R. p. 595) and opposed to rapid transit extension into the Whitestone district (R. p. 569).

The distances from stations on the Whitestone Branch to stations on the Port Washington Branch and to the Main Street station of the rapid transit line are not great. They are shown by the company's Exhibit 14, R. p. 731, measured along well maintained main artery highways. A witness from the Queensborough Topographical Bureau, testifying for the Commuters' Association, found shorter routes (Mr. McWilliams, R. p. 493, *et seq.*) and he was corroborated

by another witness for the Association (Mr. Marck, R. p. 624).

The distances as shown by Exhibit 14, R. p. 731, are:

| | Miles |
|---|---|
| Whitestone Landing to Broadway..... 10th Avenue to 154th Street to 15th Avenue to Willets Point Road to Cross Island Boulevard to 160th Street to Northern Boulevard to Depot Lane to Depot entrance. | 3.3 |
| Whitestone to Broadway..... 16th Street to Cross Island Boulevard to 160th Street to Northern Boulevard to Depot Lane to Depot entrance. | 2.4 |
| Malba to Broadway..... Malba Drive to 14th Avenue to Whitestone Avenue (Parson's Boulevard) to 20th Avenue to Cross Island Boulevard to 160th Street to Northern Boulevard to Depot Lane to Depot entrance. | 3.1 |
| College Point to Main Street, Flushing..... 18th Avenue to 122nd St. to Northern Boulevard to Main Street to Depot entrance. | 2.5 |
| College Point to Flushing, Main St. Subway Station. 18th Avenue to 122nd St. to Northern Boulevard to Main Street to Subway entrance. | 2.4 |

Mr. McWilliams (R. p. 493) made the distances Whitestone Landing to Flushing 2.9 miles, Whitestone Landing to Broadway 2.6 miles, Malba to Murray Hill 2.5 miles, College Point to Main Street 2.5 miles.

The evidence was ample to support the conclusion that busses could be furnished on routes convenient to the

Whitestone Landing and Whitestone people which would enable them to reach (a) the rapid transit line where there is a 5-cent fare or (b) stations on the Port Washington Branch where there are much more frequent trains than on the Whitestone Branch (R. p. 730A, Timetable Exhibit No. 13).

In the Petition (R. p. 7), subdivision 17, it is alleged that the "uncontroverted testimony of real estate men" was that if service were discontinued on the branch real estate values would depreciate. The effect of abandonment was a question to be passed upon by the Commission. In view of the evidence in the case even if it were true that there might be some temporary depreciation in value or even some permanent loss in value it was for the Commission to weigh this in connection with all of the other facts in the case. There was ample evidence in the case to justify the conclusion that there would be no depreciation in values because of the substitution of other transportation facilities for the line to be abandoned.

The opinions of witnesses in the real estate business as to probable depreciation of real estate values in the event of cessation of operation of the branch were obviously born of unfounded fears and entitled to little weight in view of all of the circumstances brought out in great detail on the hearings. They were relevant to the question of public convenience and necessity but not conclusive even if uncontradicted. What the effect of abandonment might be upon real estate values was one of the questions to be considered in the light of all of the evidence and weighed by the Commission with all of the other evidence bearing on public convenience.

F. (2d) 859, 860, C. C. A. (Opinion as to the value of good will):

> "A jury, commission, or board may not arbitrarily ignore or discredit the testimony of unimpeached witnesses, so far as they testify to facts, and a willful disregard of such testimony will be ground for a new trial; but the rule is different when witnesses testify merely as to their opinion. The jury or board may accept or reject this testimony, and reach a conclusion in accordance with its own knowledge, experience, and judgment. *Idaho Power Co.* v. *Thompson* (D. C.) 19 F. (2d) 547, 562; *W. S. Bogle & Co., Inc.* v. *Commissioner,* (C. C. A.) 26 F. (2d) 771; *Head* v. *Hargrave,* 105 U. S. 45, 49, 26 L. Ed. 1028; *The Conqueror,* 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 937."

*Clark Hardware Co.* v. *Suave,* 220 F. R. 102, 103, C. C. A. (Opinion as to value of property real and personal):

> "Witnesses testified that in their opinion the property ordered sold would not bring enough to pay the liens thereon; but the lower court was not bound by the opinions of these witnesses, even if uncontradicted. *The Conqueror,* 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; *Head* v. *Hargrave,* 105 U. S. 45, 26 L. Ed. 1028; *Forsyth* v. *Doolittle,* 120 U. S. 73, 7 Sup. Ct. 408, 30 L. Ed. 586; *Harrison* v. *Clarke,* 164 Fed. 539, 90 C. C. A. 413; *Taintor* v. *Franklin National Bank of New York* (C. C.) 107 Fed. 825."

*Anchor Co.* v. *Commissioner of Internal Revenue,* 42 F. (2d) 99, 100, C. C. A. (Opinion as to value of real property):

> "It is said that the Board (a Board of Tax Appeals) had before it no evidence, except the testimony of

Franklin, as to market value on March 1, 1913; but this ignores the determination of the Commissioner, which was before the Board, and, as shown above, was prima facie correct. And even if this were not true, we do not think that the Board on the question of valuation, is to be held bound by the opinion of experts. Such evidence is competent, but it is not to be blindly followed. It should be weighed by the Board in the light of the other facts developed in the case and of the general knowledge and experience of the members, and is by them to be given only such weight as in the light thereof may seem to be just and reasonable. *The Conqueror,* 166 U. S. 110, 131, 17 S. Ct. 510, 41 L. Ed. 937; *Head* v. *Hargrave,* 105 U. S. 45, 49, 26 L. Ed. 1028; *Am-Plus Storage Battery Co.* v. *Commissioner* (C. C. A. 7th) 35 F. (2d) 167, 169."

*Taintor* v. *Franklin Nat. Bank,* 107 F. R. 825, 826, C. C. A. (Opinion as to value of professional service):

"There are innumerable instances where uncontradicted testimony of this character has been disregarded, and where, upon a conflict, the trial court has declined to follow the testimony offered by either side and its action in this regard has been approved by the appellate courts. *Head* v. *Hargrave,* 105 U. S. 45, 26 L. Ed. 1028."

*The Conqueror,* 166 U. S. 110, 131, 132, 133 (Opinion as to value of steam yacht):

"While there are doubtless authorities holding that a jury (and in this class of cases the court acts as a jury) has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses so far as they

testify to facts, and that a wilful disregard of such testimony will be ground for a new trial, no such obligation attaches to witnesses who testify merely to their opinion; and the jury may deal with it as they please, giving it credence or not as their own experience or general knowledge of the subject may dictate. * * * The evidence of experts as to the value of professional services does not differ in principle from such evidence as to the value of labor in other departments of business, or as to the value of property * * * In short, as stated by a recent writer upon expert testimony the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinions of scientific witnesses." (Citing many cases.)

**Freight Service.**

There was ample evidence to support the conclusion that freight traffic over that portion of the branch sought to be abandoned can be served conveniently and expeditiously over that portion of the branch which the company proposes to retain, supplemented by trucking service for less than carload freight to College Point and Whitestone.

There are only four private sidings serving five industries an none of the industries appeared to oppose the abandonment for the reason undoubtedly that they can find other locations with side track facilities or can be served satisfactorily by the new team track facilities which the Long Island has established at Flushing on the Corona Meadows. The company has ample property at this point

for expansion. The present capacity is 65 cars, the ultimate capacity 1,125 cars (R. p. 258).

As to industries without private sidings only two appeared to oppose the abandonment. Obviously all but these two felt that they could be adequately served by the new freight layout on the Corona Meadows and by the freight stations at College Point and at Whitestone which the company will maintain for l. c. l. freight if the branch be abandoned (R. p. 258). Trucking service for freight was inaugurated prior to the filing of the petition for abandonment of the branch. There has been no difficulty with the state or city authorities. The necessary rights have all been obtained and it is only a question of continuing and enlarging the service to meet such demands as may arise upon the abandonment of the branch.

One of the industries which appeared in opposition to abandonment was the Lily-Tulip Cup Corporation with a plant at College Point. This company manufactures paper cups and has about 200 cars a year inbound, and outbound about 1350 tons mostly l. c. l. (R. p. 540).

If the branch be abandoned and this company remains at College Point it would be in the same position with respect to l. c. l. that it is now because the Long Island has undertaken, in case of abandonment, to maintain a freight station at College Point (R. p. 258). With respect to carload freight, such freight has to be trucked now and it would have to be trucked only a short distance further than it is trucked now, that is to say, from the new yard at Corona Meadows or from the team track facilities at Auburndale. The representative of the company who

appeared at the hearing said (R. p. 546), when asked what the additional cost would be in dollars: "That would not amount to much, approximately $2,000 for freight coming in. I cannot give you the figure offhand for the freight going out".

It should be noted however that the Lily-Tulip Cup Corporation has another plant at the Bush Terminal in Brooklyn and the representative of the company volunteered that economies could be accomplished by combination of the two plants (R. p. 542). He also testified that labor conditions at College Point were almost prohibitive and told in detail how advertising for three consecutive days in three or four newspapers brought only three applicants for jobs (R. p. 543), while on the other hand at their Brooklyn plant in Bush Terminal the company could get plenty of labor at lower prices (R. pp. 543, 546). The witness frankly said that owing to labor conditions it was "very dubious" whether the two plants could be combined at College Point. It seems evident that the College Point plant will be taken to Bush Terminal where the office and selling force seem to have been taken already (R. p. 542), and where labor conditions are favorable.

The other industry which appeared in opposition to the abandonment was the American Hard Rubber Company. Its plant is located at College Point ¾ mile from the freight station (R. p. 538). It has about 77 carloads of freight inbound and 52 carloads outbound and about 466,000 pounds of l. c. l. freight annually (R. p. 532). The company has a dock of its own on the waterfront now (R. p. 537). As to l. c. l. the company would have a freight

station at College Point in case of abandonment and as to carload freight it has to be trucked now ¾ of a mile and would only have to be trucked a distance of about 3 miles (R. p. 538).

**The Company's Offer to give the Branch to the City.**

Under date of July 13th, 1926 (R. p. 248), the Company offered to quitclaim the branch to the City to be converted into a highway or a rapid transit route. The offer included the company's shore property consisting of about 20 acres of which 3 acres is land under water and includes a pier at Whitestone Landing, pointing out that the frontage on the East River or Sound is about 1,000 feet and that the shore property could be used either for a park or for rapid transit terminal purposes or for whatever use the city might find it to be fitted.

The Flushing rapid transit extension subsequently put into service in January, 1928, was nearing completion. The Long Island, anticipating that as soon as the extension was completed its passengers would turn to the lower fare service, and confronted with a capital expenditure of over $2,000,000 for grade separations, felt that the city might take over the branch. It is so located as to afford a convenient point of connection with the Flushing Extension (see Exhibit 4, R. p. 648, and testimony, R. p. 260). It seemed to the Company that if it were made part of the rapid transit system the Whitestone District with a five-cent fare to all part of the city would immediately furnish a business profitable to the city and its operating lessees.

The offer to the city was in full as follows (Exhibit 1, R. p. 636):

THE LONG ISLAND RAILROAD COMPANY
General Office, Pennsylvania Station

New York, N. Y.
JULY 13, 1926.

Hon. JAMES J. WALKER,
Mayor, City of New York.

Hon. JOHN F. GILCHRIST,
Chairman, Transit Commission.

Hon. MAURICE E. CONNOLLY,
President, Borough of Queens.

GENTLEMEN:—

On behalf of the Long Island Railroad Company, I ask your cooperation in the consideration of a question which concerns the City generally and the Borough of Queens particularly, especially that portion of the Borough traversed by the Whitestone Branch of the Railroad.

It has long been recognized that the logical development of the rapid transit lines of the City would ultimately supplant the service performed by the Railroad on the Whitestone Branch. As far back as in 1917, the Public Service Commission made detailed studies of plans for extending the rapid transit system to Whitestone by a route leading off of the Flushing Line, and took up with the Railroad Company the question as to whether the Whitestone Branch could be acquired in aid of such an extension. The general slowing up of rapid transit development by the City has held the negotiations in abeyance, although from time to time the project has been revived and discussed with us.

The rapid transit line to Flushing is now practically completed, and will be opened for operation within a few weeks.

In the meantime the vehicular traffic has greatly increased on the highways of the City, and the necessity of eliminating grade crossings has become more and more pressing. The Transit Commission has ordered the elimination of four grade crossings on the Whitestone Branch. There are eight more crossings on the program of the Commission for elimination later on. The cost of separating all the grade crossings on that Branch will be about $4,000,000 of which the City would pay one-quarter, the State one-quarter, and the Railroad one-half:* The expenditure of this amount of money on a facility that will inevitably be replaced by other means of transportation in the near future seems, to us, to be wasteful. We believe that it is to the interest of all concerned that such waste be avoided.

The Long Island Railroad Company recognizes that the City may not be able to determine immediately how the territory in question will be served by the rapid transit systems and bus systems now under consideration. We ask, however, your serious consideration of the following plan:

(a) The Long Island Railroad to quitclaim the Whitestone Branch to the City, between the east bank of the Flushing River and Whitestone Landing, to be converted into a highway or a rapid transit route, whichever may seem to the City to be the best plan. The Company to include in the grant to the City its

* By amendment to the statute since the letter was written the State's share would be 49%, the City's 1% and the Railroad Company's 50%.

shore property consisting of about twenty acres, of which three acres is land under water, and include also the pier at Whitestone Landing. The frontage of this property on the East River is about 1,000 feet in length.

The shore property could be used for a park or rapid transit terminal purposes, or whatever other use the City might find it to be fitted.

(b) Pending the development of the rapid transit plans and the plans for busses, the Railroad would, if the City so desires, operate busses either on the Railroad right-of-way, after it has been converted into a highway by the City, or on nearby highways designated by the City, or both. Such bus operation could be from Whitestone Landing to Amity Street station of the existing subway, or to Main Street station, Flushing, or both.

The above described plan would save the City about $1,000,000 its share of the grade crossing elimination expense; it would give to the City a strip of land about four miles in length for highway or rapid transit purposes, the value of which, as real estate, together with the shore terminal property, is about $1,200,000; it would furnish ad interim bus service if the City so desires; it would save the State about $1,000,000 its share of the elimination expense, and the Railroad Company about $2,000,000.*

The $4,000,000 which the City, State and Railroad Company would have to spend to separate the grades on this Branch could be used elsewhere.

The rebuilding of the Whitestone Branch—for that is what the elimination of all the grade crossings

* See footnote, p. 52, *supra.*

means—could hardly be finished before the use of the Branch would be superseded by rapid transit service.

As to the freight handling on the Branch: The distribution of freight in the metropolitan District is undergoing rapid changes. Trucking is supplementing rail service—central freight stations serving wide areas are being developed. The territory traversed by the Branch can be served without serious hardship to the few industries now located in the territory. Freight distribution could be from the team yards and freight station now being constructed between Jackson and Roosevelt Avenues, in the Flushing Meadows.

I enclose a map showing in outline the location of the Branch, the right-of-way, and the waterfront property that we are suggesting to quitclaim to the City.

Will you be kind enough to give me, as promptly as possible, your views on this subject.

Yours very truly,

(sgd) G. LeBoutillier,
Vice-President.

The Board of Estimate and Apportionment referred the foregoing offer to the Board of Transportation. The Board of Transportation made a report, June 5, 1928 (City's Exhibit 5, R. p. 649), against the acceptance of the offer. On April 18, 1931 a Special Committee of the Board of Estimate made a report in which it concurred in the Board of Transportation's report and recommended that the acceptance of the offer be declined. On May 8, 1931 the Board of Estimate and Apportionment by formal resolution approved that recommendation. (The Report of the Special Committee is set forth in full in the Company's petition to

the Interstate Commerce Commission, dated May 12, 1931, R. p. 98).

It should be noted that one of the Transportation Board's reasons for its adverse recommendations was (Report, City's Exhibit 5, R. p. 658):

> "the fact that residents of the vicinity can be speedily brought to rapid transit by busses and trolley cars".

**The Company's Offer to Install Bus Service and the City's Failure to Grant Franchises.**

In July 1926 in its offer to quitclaim the branch to the city for a rapid transit route or to be converted into a highway whichever might seem best to the City (Exhibit 1, *supra*), the company said:

> "Pending the development of the rapid transit plans and the plans for busses, the Railroad would, if the City so desires, operate busses either on the Railroad right-of-way, after it has been converted into a highway by the City, or on nearby highways designated by the City, or both. Such bus operation could be from Whitestone Landing to Amity Street station of the existing subway, or to Main Street station, Flushing, or both."

At the hearings in the case Mr. LeBoutillier, Vice-President, repeated the company's willingness to furnish busses (R. pp. 258, 284), also to maintain freight stations at College Point and Whitestone and truck less than carload freight from Flushing (R. p. 258).

As hereinabove set forth no consents or franchises from the local authorities are necessary for the truck service.

In the certificate of abandonment, 162 I. C. C. 385 (R. p. 58), was the following:

> "* * * *Provided, however,* and this certificate is issued on the express condition, that coincident with said abandonment the Long Island Railroad Company, if it may lawfully do so, shall establish adequate bus service at all stations now served on the Whitestone branch with the exception of Bridge Street, Flushing, and establish truck service for less-than-carload freight at College Point and Whitestone, such bus and truck service to continue in operation until such time as the area served shall have been afforded adequate service by other instrumentalities."

In the report by the full commission, after reargument, 166 I. C. C. 671, 678 (R. p. 69), the company was directed to submit its proposal (for substitute service) to the local authorities and to send a copy of its proposal to the commission within sixty days from the service of the report. The Commission said:

> "* * * The record shows considerable dissatisfaction with the applicant's local service on the branch, as well as with its service to and from Manhattan Island. Question will doubtless arise as to transportation service to and from industries at Whitestone Landing and College Point. In the solution of these questions the cooperation and aid of the Transit Commission and the city will be necessary. The applicant will be expected to submit its proposal in detail to the local authorities, sending a copy to us, within 60 days from the service of this report."

The report was served on or about November 7th, 1930. On November 8th 1930 the railroad company pursuant

to said direction sent the following letter to the Mayor and to the Chairman of the Transit Commission (R. p. 97):

NOVEMBER 8TH, 1930.

Hon. JAMES J. WALKER,
Mayor of the City of New York,
City Hall,
New York City.

Hon. WILLIAM G. FULLEN,
Chairman, Transit Commission,
270 Madison Avenue,
New York City.

GENTLEMEN:

I herewith enclose a copy of the Report of the Interstate Commerce Commission on reargument of the Commission's Case, Docket No. 7353, Abandonment of the Whitestone Branch, originally reported in 162 I. C. C. 363, re-argued on July 10, 1930, and decided November 3d, 1930. A copy of the Report was served on us November 7th. You will note that the Commission expects the Long Island Railroad Company to submit to the local authorities within 60 days its proposal for temporary bus service to take the place of the passenger service now furnished by the Whitestone Branch.

Mindful of the fact that the City has under consideration the granting of franchises for a comprehensive bus system in Queens which will include adequate routes for serving the Whitestone-College Point territory, the Long Island Railroad Company would like to ascertain from the City what, if any, franchises the City may wish the Company to take temporarily pending the completion of the City's permanent bus system. Before making any formal application or taking any steps in the matter, the Long Island Rail-

road Company wishes to confer with the City and the Transit Commission to the end that the best solution of the problem may be reached. It asks that such a conference be arranged at an early date.

Yours very truly,

G. LEBOUTILLIER
Vice-President."

On November 20th, in response to the foregoing letter it received the following from the Chairman of the Transit Commission, R. p. 97:

"TRANSIT COMMISSION
270 Madison Avenue
New York, Nov. 20, 1930.

Mr. GEORGE LEBOUTILLIER,
Vice-President,
The Long Island Railroad Co.,
Pennsylvania Station, New York City.

DEAR SIR:

In your letter dated November 8, 1930, received November 11, 1930, referring to the Interstate Commerce Commission decision of November 3, 1930, in Finance Docket No. 7353—Abandonment of the Whitestone Branch—you call attention to the fact that the Interstate Commerce Commission expects the Long Island Railroad Company to submit to the local authorities within 60 days its proposal for temporary bus service to take the place of the passenger service now furnished by the Whitestone Branch, and express a wish to confer with the City and the Transit Commission in order to ascertain from the City what, if any, franchises the City may wish the Company to take temporarily.

The Transit Commission is always desirou[s] to [co]-plying any necessary and proper information [as]-

sistance to those who seek it; but feels that its participation in a conference concerning the granting of a franchise would be of no value. Under our statute the granting of bus franchises is exclusively in the hands of the local authorities. With such matters the Commission has nothing to do. Its presence is unnecessary and might give rise to an erroneous inference that it was intruding into the deliberations of those who are competent to handle such matters.

After the local authorities have acted, the grantees must come to the Commission for a certificate of convenience and necessity. In such case, the Commission acts in a quasi-judicial capacity and upon evidence taken at a hearing. Nothing appears in this case which calls for or would justify a departure from the required practice.

For these reasons the Commission feels that it is neither necessary nor proper for it to participate in such a conference as you suggest; but stands ready to assist you with any information which does not involve the expression of an opinion prematurely formed in advance of a regular hearing.

Very truly yours,

(Sgd) WILLIAM G. FULLEN,
Chairman."

The Board of Estimate and Apportionment made no reply to Mr. LeBoutillier's letter of November 8, 1930.

On December 12, 1930 the Railroad Company made formal application to the Board of Estimate and Apportionment for bus franchises. (See Exhibit A, attached to and forming part of the Company's Answer, R. p. 86.) The Company said in its Application (R. p. 94):

"We are willing to accept franchises or terminable permits for any length of time that your honorable

board may specify. We will be willing to surrender the franchises at any time upon short notice. We are willing to accept a franchise or franchises for any part of the routes for which we have petitioned."

and also (R. p. 96):

"We are willing to modify or supplement our petition for franchises and this our statement accompanying it in such way as your honorable board may suggest, to the end that bus service may be supplied in conformity with the orders, directions and suggestions of the Interstate Commerce Commission."

The Board of Estimate and Apportionment having taken no action on the Company's application for bus franchises, the Railroad Company on or about January 3, 1931, reported in detail its efforts to secure the cooperation of the local authorities and suggested that it would make further report when the Board of Estimate and Apportionment had taken formal action on the Company's application for bus franchises (R. p. 124).

On May 8, 1931, the Board of Estimate and Apportionment, by formal resolution approving the recommendations of a Special Committee (1) declared against taking over the Whitestone Branch; (2) declared its policy to be to progress speedily the rapid transit extension of its Flushing route; (3) declared its policy to be to progress speedily the granting of franchises for bus service to corporations other than petitioner. (See Report of Special Committee, printed in full in the Railroad Company's Petition to the Board of Estimate and Apportionment, dated May 8, 1931, being Exhibit B attached to the Company's Answer in the present suit, R. p. 100.) Whereupon the Company forthwith and

on May 12th, 1931, filed its Petition to the Interstate Commerce Commission setting forth the failure of the municipal authorities to cooperate with the company and asking that an effective date of the certificate be fixed by the Commission. (Exhibit B, attached to the Company's Answer in this suit, R. p. 98.) The Commission on June 17, 1931, made its supplemental report and order fixing October 15th as the definite date of abandonment (R. p. 72).

## Conclusion.

"The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the state. * * * The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." *Colorado* v. *United States* (*supra*) at pages 165-166.

After a searching and (evidenced by its Reports) painstaking inquiry into the facts the Commission has exercised its judgment.

We submit (1) that the jurisdiction of the Interstate Commerce Commission is clear, (2) that there was ample evidence to support the Commission's findings and conclusions.

The decree of the lower Court should be affirmed.

ALFRED A. GARDNER,
JOSEPH F. KEANY,
Of Counsel.

New York, N. Y.
November 17, 1931.

# APPENDIX.

## Opinion of the District Court (R. p. 741).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

TRANSIT COMMISSION and WILLIAM G. FULLEN, LEON G. GODLEY and CHARLES C. LOCKWOOD, constituting the TRANSIT COMMISSION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA and THE LONG ISLAND RAILROAD COMPANY,

Respondent,

AND

INTERSTATE COMMERCE COMMISSION,

Intervening Respondent.

---

THE STATE OF NEW YORK,

Petitioner,

vs.

THE UNITED STATES OF AMERICA and THE LONG ISLAND RAILROAD COMPANY,

Respondent,

AND

INTERSTATE COMMERCE COMMISSION,

Intervening Respondent.

Before:

MARTIN T. MANTON, Circuit Judge,
FRANCIS G. CAFFEY and
ALFRED C. COXE, District Judges,
convened pursuant to § 266* of the Judicial Code.

* Should be Section 47, Title 28, of the U. S. C. (see opinion at p. 64 *post* and final decree).

Suit in equity to enjoin the enforcement of and to set aside a certificate and order of the Interstate Commerce Commission (28 U. S. C. A., §§ 41, 43, 48). Motion for preliminary injunction denied and bill dismissed.

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Transit Commission.
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of Counsel.

WILLIAM G. FULLEN, Esq.,
Chairman of the Transit Commission.

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MANTON, Circuit Judge.

This suit seeks to set aside and annul an order of the Interstate Commerce Commission which permits the Long Island Railroad Company to abandon a branch line—the Whitestone—of its system of railroads on Long Island in New York State (Deficiencies Appropriation Act, 28 U. S. C. § 47). The branch is four and one-tenth miles long, extending from the west bank of Flushing River to Whitestone Landing, all in Queens County and in New York City.

After due application therefor and hearings held, the Commission made an order and certificate, dated April 10, 1930, permitting the abandonment with the effective date thirty days thereafter. In the order, the Long Island Railroad Company was directed to install substituted service for transportation of freight and passenger traffic. The freight service might be lawfully furnished without securing further rights or franchises from the city authorities, but the passenger service could not. After argument on

November 30, 1930, had before the full commission, it adhered to its permission to abandon the line and directed the railroad company to substitute its proposed service if permitted by the local authorities, and report to the commission the result within sixty days. The railroad company complied with this direction but their application before the Board of Estimate and Apportionment of the City of New York for a franchise to operate the bus service was not acted upon, and permission therefor was not secured. The company reported this to the Commission on May 12, 1931 and asked to be relieved of the obligation to install or secure substituted service and petitioned that a definite date of abandonment be fixed. The Commission supplemented its report and ordered and fixed the effective date of the certificate of abandonment as of June 17, 1931* (*L. I. R. R. Abandonment,* 175 I. C. C. 163). This suit to enjoin the abandonment was later commenced and a motion for interlocutory injunction prayed for.

The claim of the petitioner is that the Interstate Commerce Commission did not have jurisdiction to make the certificate and order as entered and that its findings and conclusions are not supported by the evidence.

The Commission found, upon sufficient evidence, that the Whitestone Branch originally was constructed in segments by several small independent companies between 1868 and 1886; that there were five stations served, namely, Bridge Street, Flushing, College Point, Malba, Whitestone, and Whitestone Landing; Flushing is served by the Port Washington Branch and a rapid transit railway owned by

*Should be 120 days from June 17, 1931.

the City of New York and operated by the Interboro Rapid Transit Company and the New York Rapid Transit Corporation; the Whitestone Branch is within the limits of the greater city and is operated principally in passenger service between the stations named and the Pennsylvania Station in New York City; the population of the area served was 28,900 as of 1925, an increase of about 20% over 1920; that the trend of traffic, as to the number of passengers carried, was

2,435,370 in 1925;
2,461,380 in 1926;
2,260,927 in 1927;
1,583,153 in 1928; and
568,954 in the first five months of 1929.

indicating a decrease in 1929 as compared to the first five months of 1928 and at the same rate, the number of passengers for the year would be about 1,113,000. The Commission found that the rapid transit line to Flushing was placed in operation January 21, 1928, and that the number of passengers carried on the Whitestone Branch during that year declined to 1,583,153 as compared with 2,260,927 in 1927, a loss of approximately 30% and this occurred despite the fact that the population of the area had increased. It also found that the area is close to rapid transit facilities and that if the Whitestone Branch did continue in operation, it would lose in favor of the rapid transit system, for the rate of fare to the Pennsylvania Station on the branch line is greater than the 5¢ fare paid on the rapid transit line. The Long Island Railroad is found

to be engaged in the interstate carriage of freight. It consists of one system in single ownership, with no separation, physically or financially or in operating practice into two systems. The lines of both freight and passenger service are electrified to some extent, more extensive within the limits of the city. But the electric lines connect with the steam lines at the edge of the suburban electric district. It appears to be the policy of the railroad company to substitute electrification gradually and the fact that electric power is more extensively used for the urban and suburban service does not make that service a separate system. (*Southern Pacific Abandonment,* 162 I. C. C. 391). Long distance train service also use the urban and suburban traffic. The entire system is operated at a profit but this does not warrant the claim of the petitioner that because of such prosperity, it must maintain a branch which is operated at a loss, where the traffic thereon is progressively lessening. (*Colorado* v. *United States,* 271 U. S. 153; *Southern Pacific Abandonment,* 162 I. C. C. 391; *Abandonment by Mobile & Ohio R. R.,* 138 I. C. C. 305; *Abandonment of the line of the Chicago, Rock Island & Pacific R. R.,* 138 I. C. C. 793; *Abandonment of the line by the B. & O. R. R.,* 145 I. C. C. 655.)

The Commission found, upon sufficient evidence that there were private sidings serving five industries on this branch line and that as to these, there is motor truck competition for such freight traffic. The record shows that from 75 to 80 per cent of the freight of the system moves interstate while the passenger traffic is intrastate. The following table shows the operating revenues and operating

expenses for 1925, 1926, 1927 and 1928, showing a deficit in 1927 of $18,467.51; in 1928, $125,758.97; while in 1929 the loss exceeded $150,000.

| Railway Operating Revenues: | 1925 | 1926 | 1927 | 1928 |
|---|---|---|---|---|
| Freight | $12,080.39 | $12,910.56 | $13,048.01 | $12,519.70 |
| Passenger | 443,434.77 | 449,094.99 | 414,193.02 | 277,201.70 |
| Excess Baggage | 121.86 | 136.36 | 81.93 | 61.81 |
| Mail | 489.84 | 480.73 | 494.47 | 590.41 |
| Other Passenger Train | 216.59 | 267.72 | 185.07 | 221.30 |
| Switching | 7.20 | 2.60 | 18.90 | 149.85 |
| Station, train and boat privileges | 60.85 | 53.40 | 51.37 | 43.00 |
| Storage—freight | 972.45 | 1,019.62 | 739.60 | 829.44 |
| Storage—Baggage | 13.32 | 9.54 | 4.44 | 6.81 |
| Demurrage | 6,821.00 | 5,061.00 | 2,629.00 | 3,958.00 |
| Miscellaneous | 1,874.00 | 889.00 | 869.00 | 1,019.00 |
| Total | $466,092.27 | $469,926.52 | $432,314.81 | $296,691.02 |

| Railway Operating Expenses: | 1925 | 1926 | 1927 | 1928 |
|---|---|---|---|---|
| Maintenance of Way and Structure | $58,014.82 | $44,943.71 | $48,251.12 | $57,735.23 |
| Maintenance of Equipment | 66,681.36 | 68,192.65 | 61,800.26 | 61,245.53 |
| Transportation | 239,271.32 | 232,505.42 | 234,313.72 | 215,042.36 |
| Total | $363,967.50 | $345,641.78 | $344,365.10 | $334,023.12 |
| Net Revenue from Railway operations | 102,124.77 | 124,284.74 | 87,949.71 | 37,332.10 def. |
| Railway Tax Accruals | 14,648.35 | 17,412.28 | 19,249.86 | 17,636.87 |
| Joint Facility Rents—Dr | 71,374.20 | 93,408.46 | 87,167.36 | 70,790.00 |
| Net Railway Operating Income | 16,102.22 | 13,464.00 | 18,467.51 def. | 125.758.97 def. |

The company has been directed to eliminate grade crossings on this Whitestone Branch, estimated to cost upwards of four million dollars, one-half of which must be borne by the railroad and the other half to be paid out of a fund provided therefor by the State of New York. The entire sum may be paid out of this fund, but the railroad company is obligated to meet one-half by borrowing one-half the cost from the State. If the money is borrowed from the State, a lower basis of interest is charged—4½%—or about $90,000. per annum. However, ultimately two mil-

lion dollars will have to be paid by the company. There would be a saving in this item of expense of $37,300. for grade crossing protection. This expenditure of two million dollars by the railroad for eliminating the grade crossings would cost about $500,000. per mile over this branch line.

The Commission found that bus passenger service and motor truck freight service would adequately meet the requirements of the communities served by this branch.

The authority of the Interstate Commerce Commission to issue its certificate authorizing the abandonment of the branch line of the railroad company, engaged in interstate commerce to the extent that the Long Island Railroad Company is, may not be questioned. (Section 1, paragraphs 18 and 19 of the Interstate Commerce Commission Act as amended by the Transportation Act of 1920; *Colorado* v. *United States,* 271 U. S. 153; *R. R. Comm. of Calif.* vs. *So. Pacific,* 264 U. S. 331; *Dayton & Goose Creek R. R.* vs. *United States,* 263 U. S. 456; *New England Divisions Case,* 261 U. S. 184; *R. R. Co. of Wisc.* vs. *C. B. & Q. R. R.,* 257 U. S. 563.) This court has jurisdiction to enjoin, set aside and annul or suspend an order of the Interstate Commerce Commission. (*Proctor & Gamble* vs. *United States,* 225 U. S. 282; *Mfgrs. Ry. Co.* vs. *United States,* 246 U. S. 457; *Seaboard Air Line Co.* vs. *United States,* 254 U. S. 57.) But if there is substantial evidence to support the Commission's order and it has acted within its statutory authority, the order must be sustained. The court will not weigh the evidence before the Commission to consider the wisdom or expediency of the order or say whether under like testimony it would make a similar ruling. If there is a finding that the abandonment of the branch line would

serve the public interest and it is made upon a balancing of the respective interests, the effect being to decide in fairness for all concerned, the judgment of the Commission, either granting or denying the certificate of abandonment will be supported by the courts. (*Colorado* vs. *United States, supra; Interstate C. C.* vs. *Union Pacific,* 222 U. S. 541.) The Transportation Act of 1920 called for "a new scheme to build up a system of railways prepared to handle promptly all interstate traffic of the country", the Supreme Court announced in construing the statute. (*Dayton & Goose Creek* vs. *United States,* 263 U. S. 456; *Davis* vs. *Farmers Co.,* 262 U. S. 312.)

On the facts shown in this record, we are satisfied that the freight business on this branch of the railroad is sufficiently large in its interstate character to burden interstate commerce if the losses sustained continue. Indeed, estimates were given that the carrier's loss on this branch in the future would become progressively worse. Within the rule of the *Colorado Case* (*supra*), there is ample to support the order and certificate. To continue would burden interstate commerce.

For the Interstate Commerce Commission to authorize abandonment is not an invasion of a field reserved for State regulation for, as said in the *Colorado Case,* "the obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the state is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce." This railroad did not undertake by its charter to continue to operate this branch regardless of the cost. It was the purpose of Congress,

by the Interstate Commerce Act and its amendments, to prevent interstate carriers from incurring expenses which would lessen their ability to perform well their interstate functions. (*Los Angeles Union Station Case*, 264 U. S. 331.)

We think the Commission has acted cautiously and prudently and has given full opportunity to all parties in interest to be heard, and upon consideration of the evidence have had due regard for the welfare of the communities immediately affected. It has acted within the authority lawfully conferred upon it by Congress to insure adequate railroad transportation for the country. In this instance, the Commission's suggestion that a bus service be provided for, together with motor truck freight service to take the place of railroad transportation, meets with our approval. If the local authorities will grant the necessary franchises, the offer of the railroad company to meet the needs of the community should be accepted.

The application for a preliminary injunction is denied. Since all the proof has been offered and received which the petitioner intends to offer on the issues framed by the pleadings, we will consider this as a final hearing and dismiss the bill.

Bill dismissed.

Dated, New York, October 14, 1931.

MARTIN T. MANTON
Circuit Judge.

FRANCIS G. CAFFEY
District Judge.

ALFRED C. COXE
District Judge.

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# SUPREME COURT OF THE UNITED STATES.

No. 498.—October Term, 1931.

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|---|---|
| Transit Commission and State of New York, et al., Appellants, vs. The United States of America, The Long Island Railroad Company, and the Interstate Commerce Commission. | Appeal from the District Court of the United States for the Southern District of New York. |

[January 4, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

This appeal involves the validity of a certificate of public convenience and necessity of the Interstate Commerce Commission, permitting the abandonment by Long Island Railroad Company of a portion of its Whitestone branch. Separate bills were filed by appellants to enjoin action by the railroad and to adjudge the certificate void. They were consolidated and heard by a specially constituted district court.[1] The parties having stipulated that they had offered all the proofs they desired to present, the court refused an interlocutory injunction, and dismissed the bills.

The Long Island Railroad Company, chartered under the laws of New York, whose lines lie wholly within that state, transports passengers and freight in interstate commerce by the use of steam and electricity. Its Whitestone branch extends a distance of 4.7 miles from the Port Washington branch to the Flushing River, and thence to Whitestone Landing. The bulk of its passenger traffic is intrastate, and only a slight amount interstate; but it carries a considerable volume of freight, seventy-five per cent. of which is interstate. In these respects the branch is representative of conditions throughout the system. There are five passenger

[1] Pursuant to U. S. C., Tit. 28, § 47.

stations on the branch line,—Flushing, which is much the largest, and four others beyond.

In January, 1928, the city of New York opened a rapid transit line connecting Flushing with Manhattan. There ensued a thirty-three per cent. decrease in the passenger revenue of the Whitestone branch; and its operating deficit of some $18,000 for 1927 increased to over $125,000 in 1928. There was a further decrease of over twenty-six per cent. in passenger revenue in the first five months of 1929.

On June 2, 1926, the Transit Commission pursuant to a program of grade crossing abolition ordered the elimination of four in and near Flushing. There are twelve such crossings on the entire branch, removal of all of which was in contemplation, and it was estimated that to remove them would cost about $4,000,000, the company's share being $2,000,000, which it could borrow from the state at from four to five per cent. interest. The elimination of the crossings would save $37,000 per year now spent for guarding them. On December 31, 1928, the total value of land and improvements on the portion of the branch sought to be abandoned was approximately $933,000.

The company did not appeal from the order, as it might have done, but formally offered to quit-claim to the city of New York that portion of the branch which is involved in this proceeding. The city did not accept the proffer. The effective date of the grade separation order was postponed to December 31, 1928, and upon the Transit Commission's refusal further to extend the time for compliance, the company, on January 10, 1929, filed with the Interstate Commerce Commission its application under § 1 (18) of the Interstate Commerce Act, as amended by the Transportation Act of 1920[2], for a certificate permitting the abandonment of the 4.1 miles of the branch extending from east of Flushing River to the terminus at Whitestone Landing. After interventions by the Transit Commission, the city of New York, and others, the matter was heard by an examiner, whose proposed report was the subject of argument before Division 4 of the Commission. It found in favor of the application, and ordered that a certificate issue.[3]

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[2]U. S. C., Tit. 49, § 1 (18).

[3]162 I. C. C. 363.

During the hearing the company proposed that it would substitute truck service for the freight traffic to be affected by the abandonment, and would, if a franchise were granted it by the city of New York, inaugurate a passenger bus service to the towns on the branch, which would connect them with its station at Flushing and with the terminus of the city's rapid transit line to Manhattan.

A reargument was granted before the full Commission, which affirmed[4] the report of Division 4. Since, however, the intervenors expressed some doubt as to the company's making satisfactory arrangements for bus service, the Commission indefinitely suspended the order to afford opportunity for negotiating the proposed bus franchise. The company promptly applied to the proper authorities, agreeing to take a grant terminable at short notice and on terms favorable both to the city and to the traveling public. No response was made to its offer and no action was taken on its application. After waiting five months it applied to the Commission to take final action, setting forth the neglect of the city to act in the matter. Thereupon the Commission ordered that its certificate should take effect 120 days from June 17, 1931.[5]

By their bills the state of New York and the Transit Commission challenge the power of the Interstate Commerce Commission to issue a certificate of public convenience and necessity in such a case as is here presented, and assert that if it has such power, the proofs do not warrant its action.

*First.* It is claimed that the certificate has as its sole basis the order of the State Transit Commission for the removal of grade crossings; that the latter was valid and within the state's Constitutional right, regardless of its effect on interstate commerce, and that the Interstate Commerce Commission can not destroy or impair this right, or hamper its exercise, by authorizing an abandonment of the railroad's line. We think this assertion is based upon a misconception of the Commission's action. In ascertaining the public convenience and necessity the Commission was bound to weigh the benefit to accrue to interstate commerce by the abandonment against the resultant prejudice and injury to intrastate commerce. *Colorado* v. *United States,* 271 U. S.

[4] 166 I. C. C. 671.
[5] 175 I. C. C. 163.

153, 168. The finding was that continued operation would result in a serious and increasing depletion of revenue, due to the competition by the city's rapid transit lines and their probable extension which would entail an unreasonable burden on interstate commerce. It was found that the expenditure for removal of grade crossings would, in the circumstances, be a waste of the company's funds, and that the requirement of the State Transit Commission removed all doubt of the propriety of abandonment of the branch. The magnitude of the required outlay as compared with the value of the whole property, and the resulting effect on the company's revenue, were facts properly taken into account in passing on the application. Compare *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 529; *Lehigh V. R. R. Co.* v. *Board of Commissioners*, 278 U. S. 24, 34; *New Orleans P. S. Inc.* v. *New Orleans*, 281 U. S. 682, 687.

In reaching these conclusions the Commission considered the needs of the communities served, and gave due regard to them. It was shown that the city authorities had refused to take over the line, when the company offered to convey it, on the ground that the territory could be adequately served by bus transportation. Moreover, the company could not maintain satisfactory schedules on the branch, because of congestion in the tunnels under the East River, and without better schedules could not hope to increase use of this line. It was in evidence that the company's offer to establish an adequate bus system had not been accepted by the city authorities. There was other proof, which need not be detailed, as to the intrastate traffic needs. All these matters were given due consideration by the Commission in reaching its ultimate conclusion. It followed the course outlined in *Colorado* v. *United States, supra*, and the claim that its action was beyond its authority and without warrant of law cannot be sustained. That decision requires a holding that appellant's assertion of unconstitutional invasion of the State's sovereignty is without merit. We need not elaborate what was there said on the subject (271 U. S. 165).

*Second.* Appellants insist that the Commission's findings and conclusions, assuming that its order was within its powers, lack support in the evidence. They say the proofs show the continued operation of the branch will not prejudice, burden, obstruct, or

interfere with interstate commerce, or lessen the ability of the carrier to serve that commerce, and since it is shown that the abandonment will cause prejudice to several communities the certificate should not have been granted. There is no contradiction of the fact that the branch is operating at a serious loss, as shown by the carrier's accounts offered in evidence, and that this will continue and increase from year to year and be aggravated by expenditures for the removal of grade crossings. Appellants criticize the allocation of certain rentals and overheads by the company, and point to evidence produced by them indicating that the operating losses are in fact much less than those claimed by the carrier. The Commission, however, concluded that the railroad's figures came nearer representing the true situation than those offered by the intervenors. The latter further assert that the intrastate passenger traffic of the railroad constitutes by far the greater and more profitable portion of its business; that the interstate traffic represents only about sixteen per cent. of its gross revenue and is unprofitable; that the system as a whole has large net earnings and is a successful enterprise; and that the Commission was in error in considering incidental and dependent interstate traffic as an excuse for federal interference with a highly remunerative local traffic. They seek thus to distinguish the present case from *Colorado* v. *United States, supra,* and assert that the Commission ignored the test there approved and acted upon the erroneous theory that proof that the continuance of the Whitestone branch would constitute a burden on interstate commerce was unnecessary.

We do not so read the Commission's report. That body professed to follow the decision in the *Colorado* case and we think that it did so. The Court there held that in the issuance of a certificate of public convenience and necessity the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line; that such burden might involve various elements, and that if upon the whole proof the conclusion was warranted that continued operation would in fact unreasonably burden the interstate commerce of the carrier, the Commission was justified in authorizing abandonment. There as here the system lay wholly within the state and was prosperous, and no claim was made that immediate abandonment of the local branch was necessary to enable

the carrier to earn a reasonable return on its investment. Here, as in the *Colorado* case, the Commission had regard for the needs of intrastate as well as interstate commerce. The evidence was ample to give a comprehensive view of the entire situation, and due weight was accorded all of the proofs in the light of the conflicting requirements. The contention that the Commission went upon the theory that it might authorize abandonment in disregard of the evidence is not supported by the record. The judgment must be

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*